Supreme Court, U.S.
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No. 91-1177

In the Supreme Court of the United States

OCTOBER TERM, 1991

LYNNE C. CZARNESKI, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this case should be remanded for the Tax Court to consider a claim raised by petitioner for the first time on appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is unreported. The opinion of the Tax Court (Pet. App. A9-A46) is reported as *Ewing* v. *Commissioner*, 91 T.C. 396.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1991. A timely petition for rehearing and petition for rehearing en banc was denied on September 19, 1991 (Pet. Supp. App). On December 4, 1991, Justice O'Connor extended the time for filing this petition to

and including January 17, 1992. The petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1980 and 1981, petitioner's husband, Don A. Czarneski, purchased gold futures straddle contracts through an investment program that offered innovative methods for closing out the legs of straddle positions (Pet. App. A2-A3).[1] Petitioner and her husband deducted ordinary losses on their jointly filed 1980 income tax return from the cancellation of the losing legs of the tax straddles and reported long-term capital gains on their jointly filed 1981 return attributable to the gain legs (Pet. App. A12, A31-A32).

The Commissioner issued a statutory notice of deficiency to petitioner and her husband determining that they owed income tax deficiencies in the total amount of $202,075.41 and additions to tax totalling some $10,103.77 as a result of these transactions. Petitioner and her husband were divorced in 1983 (Pet. 4), but they elected to file a joint petition in the United States Tax Court contesting the deficiencies and additions to tax asserted by the Commissioner (Pet. App. A9-A11).

2. In the Tax Court, petitioner and her husband were represented by the law firm of Hochman, Salkin & DeRoy (HS&D). That firm had written a tax opinion concerning the straddle trading program and also had been instrumental in obtaining investors for the program (Pet. App. A29-A30, A40-A41). At the start of

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[1] In general, a futures contract is an agreement to either deliver or receive a specified quantity and grade of a designated commodity, such as gold, during a designated month in the future. If a person acquires a position for the purchase of a specified commodity in one month and a different position calling for the sale of the same commodity in a different month, his position is described as a "straddle" and each of the positions is referred to as a "leg" of the straddle (Pet. App. A13).

trial on November 18, 1985, the Tax Court therefore raised on its own motion the question whether HSD's participation as trial counsel created a conflict of interest (RT 18-19). Mr. Bruce Hochman of HS&D represented that he had "solicited all the Petitioners that could be impacted by this case * * * explaining the relationships, especially that of Mr. Salkin and the law firm, and they have all agreed that the law firm and myself can proceed to try the case" (RT 19). [2] At no time during the five-year period that her case was pending before the Tax Court did petitioner object to HS&D's representation of her interests.

On August 30, 1988, the Tax Court upheld the Commissioner's determination of deficiencies and additions to tax. *Ewing* v. *Commissioner*, 91 T.C. 396 (1988). In doing so, the Court found that any potential claims of conflict of interest had been waived (Pet. App. A10 n.2):

> [The Commissioner] stipulated that he has no objection to the law firm of Hochman, Salkin, & DeRoy and its individual members, including specifically Bruce I. Hochman and Avram Salkin, serving as counsel for the petitioners in these proceedings. At the suggestion of the Court, petitioners' counsel also sought and received specific waivers from the individual petitioners with respect to any potential conflict of interest.

3. Under Tax Court Rules 161 and 162, petitioner could have promptly moved the Tax Court to reconsider or revise its finding that petitioner had waived any potential conflict. Instead, petitioner docketed her appeal. Nine months after the Tax Court decision was issued, petitioner filed a motion in the court of appeals

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[2] In the Tax Court, this case was consolidated for trial, briefing, and opinion, with several other cases involving taxpayers who had participated in the same futures trading program (Pet. App. A9 n.1).

requesting that the case be remanded to the Tax Court so that she could contest the finding that she had waived the potential conflict. That motion was denied by the court of appeals on January 8, 1991.

On July 11, 1991, the court of appeals affirmed the Tax Court decision. In doing so, the court declined to consider the conflict of interest claim raised by petitioner for the first time on appeal. The court noted, however, that "Ms. Czarneski's proper remedy *would have been* to file a motion in the tax court under Tax Court Rules * * * 161 or 162" (Pet. App. A7 (emphasis added)). The court declined to remand the case for further proceedings, but noted that its affirmance "was not intended to preclude [petitioner's] rights, *if any*, to raise her claims of conflict before the tax court" (*id.* at A8 (emphasis added)).

4. After the Tax Court decision was affirmed on appeal, petitioner moved the Tax Court to reconsider its finding that she had waived any potential conflict of interest. On December 13, 1991, the Tax Court entered its order denying that motion, concluding that it lacked jurisdiction to consider the matter because the case had not been remanded to it by the court of appeals and because, unlike the federal district courts, the Tax Court lacks jurisdiction to grant post-trial relief under the procedures of Rule 60(b) of the Federal Rules of Civil Procedure (Pet. App. A46-A48).[3]

On January 9, 1992, petitioner filed a motion with the court of appeals again requesting a remand to the Tax Court for a hearing on the conflict of interest claim. On January 29, 1992, the court of appeals denied petitioner's motion, noting that its mandate had issued on November 4, 1991 (Pet. Supp. Br. 4).

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[3] The Tax Court is a court of limited jurisdiction. See *Commissioner* v. *McCoy*, 484 U.S. 3, 6 (1987); *Handeland* v. *Commissioner*, 519 F.2d 327, 329 (9th Cir. 1975).

ARGUMENT

The court of appeals correctly declined to remand this case to the Tax Court for consideration of an issue raised by petitioner for the first time on appeal. The decision in this case does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).[4] The court of appeals thus correctly held in this case (Pet. App. A7 n.5) that petitioner's claim of a conflict of interest is foreclosed by her failure to raise that claim in the Tax Court. The Tax Court proceedings began in May 1984. The Tax Court entered its decision adverse to petitioner in March 1990. Yet petitioner did not seek to raise the issue of a conflict of interest until December 1990, after her case was already pending on appeal.

Even if petitioner did not discover the grounds for her claim until after her appeal was filed, "that still does not allow her to raise the issue for the first time on appeal" (Pet. App. A7 n.5). Since extreme prejudice to

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[4] In *Hormel* v. *Helvering*, 312 U.S. at 558-559, this Court held that a court of appeals may properly consider legal (not factual) arguments not presented to the trial court when "there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." *Ibid.* Contrary to petitioner's contention (Pet. 6), the decision in *Hormel* does not conflict with the decision in the present case. The present case does not involve new legal interpretations of existing law that were issued between trial and appeal. Instead, petitioner seeks only to challenge for the first time on appeal the factual determination made by the Tax Court that she waived any potential conflict at the trial.

litigants—and an enormous waste of both private and judicial resources—would result from allowing parties to raise new issues on appeal, this Court has long held that it is "essential" (*Hormel* v. *Helvering*, 312 U.S. at 556) that parties raise their claims first at trial.[5]

b. Petitioner errs in suggesting (Pet. 9) that, if the case is not remanded for further consideration by the Tax Court, there is no other remedy for the alleged conflict of interest that she seeks to assert for the first time on appeal. If, notwithstanding the contrary assertions of her trial counsel and the findings of the Tax Court, petitioner could establish that she was not aware of and did not waive the alleged conflict of interest, her remedy would be an action for malpractice against her counsel for any damages proximately caused by his actions. See *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 n.10 (1962).

Petitioner does not have a constitutional right to effective assistance of counsel in a civil suit, as she appears erroneously to contend (Pet. i, 8-10). Civil litigants are not entitled to a new trial simply because they believe that certain arguments should have been made on their behalf or that trial counsel had an impermissible conflict of interest and should have ceased his representation. Their remedy in these circumstances is not a new trial, but is a suit for malpractice against their counsel. See *Link* v. *Wabash R.R.*, 370

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[5] *Guenther* v. *Commissioner*, 889 F.2d 882 (9th Cir. 1989), on which petitioner seeks to rely (Pet. 9), is inapposite. In *Guenther*, the taxpayer had requested the Tax Court to disclose information contained in an ex parte memorandum that had been submitted to that court by the Commissioner. 889 F.2d at 883. The Tax Court refused the taxpayer's request. On appeal, the court of appeals remanded the case for the Tax Court to make findings concerning the ex parte submission. *Id.* at 885. The challenge to the ex parte communication in *Guenther* had been raised initially in the Tax Court and was not, as in the present case, raised for the first time on appeal.

U.S. at 633-634 & n.10; *Nicholson* v. *Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985) ("a plaintiff in a civil case has no right to effective assistance of counsel"); *Wolfolk* v. *Rivera*, 729 F.2d 1114, 1119-1120 (7th Cir. 1984) (same); *Slavin* v. *Commissioner*, 932 F.2d 598, 601 (7th Cir. 1991); *Mekdeci* v. *Merrell Nat'l Laboratories*, 711 F.2d 1510, 1523 (11th Cir. 1983); *Watson* v. *Moss*, 619 F.2d 775, 776 (8th Cir. 1980); *Kushner* v. *Winterthur Swiss Insurance Co.*, 620 F.2d 404, 408 (3d Cir. 1980); *United States* v. *Rogers*, 534 F. 2d 1134, 1135 (5th Cir.), cert. denied, 429 U.S. 940 (1976).[6]

2. The Tax Court's finding that any potential conflict was waived by petitioner is amply supported by the record. The Tax Court specifically raised the question whether a conflict of interest existed on the first morning of trial (RT 18-19). Mr. Bruce Hochman of the law firm of Hochman, Salkin & DeRoy (HS&D), stated that counsel for the Commissioner previously had raised the question whether HS&D should try this particular case. Mr. Hochman represented at trial that, after the Commissioner's inquiry, he had "solicited all the Petitioners that could be impacted by this case * * * explaining the relationships, *especially that of Mr. Salkin and the law firm*, and they have *all* agreed that the law

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[6] The rule set forth in these cases reflects the dichotomy between civil and criminal proceedings. The harm effected by ineffective assistance of counsel in criminal cases—a potentially erroneous deprivation of liberty—cannot be fully redressed by a malpractice suit against the attorney. The appropriate remedy for ineffective assistance of counsel in a criminal case is therefore reversal of the conviction. See *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). In civil cases, however, the harm effected by counsel's ineffective assistance—an allegedly erroneous monetary judgment—can be fully redressed by a malpractice suit against the attorney. It is therefore well settled that parties in civil proceedings can not avoid the consequences of the acts or omissions of their attorneys but must seek redress through an action for malpractice. *Link* v. *Wabash R.R.*, 370 U.S. at 633-634 & n.10.

firm and myself can proceed to try the case" (RT 19 (emphasis added)).[7] Counsel for the Commissioner also stated at trial that the government had no objection to proceeding with the case "in light of the fact that the Petitioners' counsel solicited waivers from all the Petitioners with respect to the conflict of interest situation" (RT 19). On this record, the Tax Court did not err in finding that the alleged conflict of interest had been waived by all taxpayers, including petitioner.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

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[7] It is not disputed that petitioner was aware that the HS&D lawfirm was representing her in the Tax Court. During 1984, petitioner signed a power of attorney form authorizing HS&D to represent her in connection with these tax issues. Motion For Remand, Affidavit of Lynne Czarneski and attached exhibits.

[8] *Duffey* v. *Commissioner*, 91 T.C. 81 (1988), on which petitioner relies (Pet. 8), is distinguishable. In *Duffey*, the Tax Court granted the Commissioner's motion to disqualify the taxpayers' counsel from representing them at trial. In this case, by contrast, all parties stipulated at trial that the potential conflict would be waived (Pet. App. A10 n.2).

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